

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of An Exemption for an  
Educational Consultant for:

OAH No. 2011080019

JEFFREY A.

Claimant,

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

**DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on September 12, 2011.

William A., claimant's father, represented claimant who was not present for the fair hearing.

Ron House, Esq., represented the service agency, San Diego Regional Center (SDRC).

Oral and documentary evidence was received and the matter was submitted on September 12, 2011.

**ISSUE**

1. Does an exemption exist under Welfare and Institutions Code section 4648.5 that authorizes the service agency to fund claimant's educational consultant?

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On July 5, 2011, SDRC served claimant with a notice of proposed action denying funding for an educational consultant for claimant. On July 25, 2011, SDRC received claimant's request for a fair hearing objecting to SDRC's decision and this appeal followed.

### *Claimant's Eligibility and Services Currently Provided*

2. Claimant is a 17-year-old male diagnosed with severe cerebral palsy. Pursuant to a January 7, 2010, Order which resulted from a previous administrative hearing, SDRC currently funds 16 hours per month of educational consultant services to assist claimant with his Individual Education Plan (IEP).

### *The Lanterman Act and Regional Centers*

3. The Lanterman Developmental Disabilities Services Act (the Lanterman Act) is found at Welfare and Institutions Code section 4500 *et seq.*

4. The State Department of Developmental Services (the DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, the DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

### *2009 Amendments to the Lanterman Act*

6. California is in the midst of an unprecedented budget shortfall. Every area of state government has been impacted by this fiscal crisis, including the DDS. Assembly Bill 9 (AB 9) was passed which amended the Lanterman Act in an effort to meet the economic predicament. Section 4648.5 was added to Welfare and Institutions Code which provides:

"(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

- (1) Camping services and associated travel expenses.
- (2) Social recreation activities, except for those activities vendored as community-based day programs.
- (3) Educational services for children three to 17, inclusive, years of age.
- (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.”

The new code section did not define “extraordinary circumstances,” nor did it indicate what would constitute “primary or critical means for ameliorating” the consumer’s developmental disability so as to allow a consumer to continue receiving these services, presumably leaving this determination to each regional center and the trier of fact on a case by case basis.

#### *Evidence Introduced at Hearing*

7. Warren Werwage, SDRC Program manager, testified that claimant is on track to graduate from high school. Werwage acknowledged that claimant’s parents do not believe he is ready to graduate, but testified that SDRC consulted with its education consultant who advised that a school district cannot hold a student back who is on track to graduate. Werwage admitted that the only “change in circumstances” from the time of the previous hearing was that claimant was now on a “diploma track.” Werwage testified that claimant’s parents’ concerns regarding safety and life skills could be taught at a day care program which claimant can attend after graduation. Werwage also testified that although claimant’s current educational consultant, Deborah Plotkin, is an SDRC vendor, she has failed to provide timely progress reports such that SDRC no longer wishes to utilize her services. However, Werwage did concede that SDRC continued to fund her services during the time she failed to provide reports.

8. Claimants' parents provided credible and convincing testimony about the constant struggles they have had with claimant's school district and getting that school district to provide services required by law and as outlined in the IEP. They also explained that Plotkin is intimately familiar with claimant's circumstances, has been instrumental in obtaining needed services, and is an essential component of claimant's IEP process.

### *Evaluation*

9. A preponderance of the evidence established that claimant qualified for an exemption under Welfare and Institutions Code section 4648.5, subdivision (c). Insufficient evidence was presented to establish that claimant no longer required the services of an educational consultant. For whatever reason, claimant's school district appears to have been an obstreperous partner in his education and it is only through the actions of Plotkin that the district has cooperated.<sup>1</sup> Terminating her services now would be extremely detrimental to claimant and his family. SDRC failed to establish a sufficient change in circumstances to warrant overturning this court's prior order establishing an exemption for educational services. Any issues between SDRC and Plotkin regarding her failure to timely provide progress reports is more appropriately handled as an internal vendor matter, possibly with SDRC withholding reimbursement of her billings until progress reports are received, but not by punishing claimant by removing her from his case.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In administrative proceedings, as in ordinary civil actions, the party asserting the affirmative generally has the burden of proof, including the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.) SDRC had the burden of establishing that an exemption for educational services no longer existed.

### *The Lanterman Act*

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the

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<sup>1</sup> It is important to note that none of claimant's requested services seemed unreasonable or unrelated to his condition. In fact, many services were to be provided per the IEP and then, for reasons that remain unclear, the school district refused to implement those services.

same age and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

3. Relevant provisions of the Lanterman Developmental Disabilities Services Act are included in the Factual Findings.

*Cause Exists to Grant the Request for an Exemption for an Educational Consultant*

4. A preponderance of the evidence established that SDRC should continue to fund educational consultant services for claimant. Claimant continued to present sufficient evidence to warrant an exemption for this service.

ORDER

Claimant's request for an exemption pursuant to Welfare and Institutions Code section 4648.5, subdivision (c), is granted. SDRC shall continue to fund claimant's request for educational consultant services.

DATED: September 23, 2011

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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**